Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANK TALLEY,
Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Montana Supreme Court has ruled contrary to over fifty years of precedent cases of this Court by holding that under the United States Constitution, it is legal for a public employer to demand as a condition of employment, that an employee, or even a citizen seeking to be an employee, must recant or "disavow" certain beliefs, and must further "acknowledge" or foster opinions contrary to his conscience.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Frank Talley
2. Flathead Valley Community College
3. Howard L. Fryett
4. Dennis P. Adams
5. No corporation is involved.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-

FRANK TALLEY,

Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Montana, dated September 29, 1995 is reported at 903 P.2d. 789 and is reproduced as Appendix A to this Petition. The unpublished memorandum of the Supreme Court of Montana, dated October 26, 1995, denying Talley's petition for rehearing is reproduced as Appendix B to this Petition.

JURISDICTION

The decision and order of the Montana Supreme Court was entered September 29, 1995, affirming the judgment of the trial court entered February 28, 1995, which judgment granted Respondents' Motion for Summary Judgment. The jurisdiction of this Court is invoked under 28 U.S.C Section 1257.

CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States, as well as 42 USC Section 1983, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech or . . . to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, Section 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

42 USC, Section 1983.

STATEMENT OF GROUNDS

In its decision dated September 29, 1995, the Montana Supreme Court has decided a fundamental question of federal law in a way that conflicts with over 50 years of applicable decisions of this Court.

STATEMENT OF THE CASE

Petitioner (Talley) was a part-time instructor at Respondent Flathead Valley Community College (FVCC), having taught various philosophy and religious studies courses from the fall quarter of 1982 through the winter quarter of 1989 on quarterly written contracts. The last 22 quarters (including summer quarters) or 5 1/2 years, were uninterrupted. There was

never any question concerning Talley's competency and his classes consistently met curriculum requirements.

At the beginning of the winter quarter of 1989, the academic dean (Respondent Adams), canceled one of Talley's classes after it had already met for one week. Talley, believing that FVCC had at least a moral obligation to continue the class, protested the cancellation; eventually going over the dean's head to the president of FVCC (Respondent Fryett), who essentially overruled the dean, and the class was reinstated.

However, for the spring quarter, Talley's classes were removed from the schedule by the dean, and for the first time in over five years, not offered to the students. Talley protested this turn of events to the college president who told Talley that if he could obtain the requisite number of signatures from the students, the classes would be put back on the schedule. Although the signatures were obtained, the classes remained cut.

Believing that his classes were cut contrary to the curriculum requirements established by the FVCC Board of Trustees, Talley requested a hearing on this subject before the Board but was refused.

Although Talley was not tenured, he believed that he had some kind of employment security. He had this belief because of the past practice of the college in employing part-time instructors year after year, some as long as twenty years, quarter after quarter. He had this belief because the part-timers were asked to commit a year in advance to their course assignments. And he especially had this belief in view of the reassurances of two former academic deans and a former college president that he could expect to continue teaching.

Likewise, Talley was familiar with certain holdings of this Court, which led credence to his belief that non-tenured faculty could enjoy a certain measure of job security, and were entitled to due process;.e.g., Perry v. Sindermann, 408 US 593, 33 L.Ed.2d. 570, 92 S.Ct. 2694 (1972); and Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d. 1435 (1983), Affirmed, 466 US 377, 80 L.Ed.2d. 377.

Believing that he was the subject of a vindictive dean who now was backed up by the college president, and fearing that he would never again teach at FVCC, Talley sought legal counsel who advised that Talley had a reasonable expectation of the opportunity for continued employment at

FVCC, and so advised FVCC in writing. On March 9, 1989, counsel for FVCC wrote back that Talley must "disavow" what he (Talley) believed to be his legal rights. He wrote that:

> ". . . I must request that your client disavow his 'expectations of continuing employment' and acknowledge the college's discretion to determine whether to offer him part-time employment on a quarter by quarter basis. In absence of such a disavowal and acknowledgment, I must advise the college, as stated above, not to employ Mr. Talley for the summer quarter and to employ him very sparingly thereafter. "

FVCC continued this demand, even when Talley was no longer an employee. On May 24, 1989, FVCC's counsel wrote:

> "Initially, I must take issue with your implication that the College is asking Mr. Talley to 'relinquish' those rights. The College is simply asking him to acknowledge, as the College firmly believes, that he has no rights to continuing employment at the College."

Relative to this belief and consequent

stated claim of employment rights by Talley, Respondent Fryett (the College President) testified at an Unfair Labor Practices hearing on October 17, 1990, "We will not hire Mr. Talley until he claims otherwise, or until the Court tells us to."

Talley has never disavowed his beliefs, nor acknowledged anything contrary to his conscience. The college did not hire Talley for the summer quarter of 1989, nor has it hired him since, not even "sparingly."

Between March 6, 1989 and June 13, 1989, Talley asked Respondent Fryett and/or the FVCC Board of Trustees for due process no less than seven times. The Trustees, following Respondent Fryett's advice, never granted a hearing.

Finally, in the fall of 1989, when Talley saw that he was not on the teaching schedule, and still morally outraged and shocked by the fact that the government (in the form of a state college) was apparently making good on its threat of having the disavowal of beliefs and the compelling of speech be a prerequisite for employment, he filed suit, alleging a number of theories, including those at issue in this Petition.

In the spring of 1992, both parties in this case filed cross motions for summary

judgment on this instant free speech issue, along with the attendant due process issue. The Montana Eleventh Judicial District Court denied both parties' motions, and left the issue for trial. On appeal, the Montana Supreme Court upheld that decision.

However, in May 1994, Respondent FVCC retained substitute counsel, and in mid-November, just a few weeks before trial, filed a Motion for Summary Judgment, urging the District Court (with a new judge presiding) to accept the view that it must decide the issue as a matter of law. And it cited as authority this Court's holdings in Connick v. Myers, 461 US 138, 75 L.Ed.2d. 708, 103 S.Ct. 1684 (1983), and that case as interpreted mainly by the United States Fifth Circuit Court of Appeal.

The District Court granted Respondent FVCC's motion. The Petitioner's appeal to the Montana Supreme Court was unsuccessful, and it is from that Court's decision that this Petition is sought.

ARGUMENT

I. THE MONTANA SUPREME COURT HAS RULED CONTRARY TO OVER FIFTY YEARS OF PRECEDENT CASES OF THIS COURT, BY

HOLDING THAT UNDER THE UNITED STATES CONSTITUTION, IT IS LEGAL FOR A PUBLIC EMPLOYER TO DEMAND AS A CONDITION OF EMPLOYMENT, THAT AN EMPLOYEE, OR EVEN A CITIZEN SEEKING TO BE AN EMPLOYEE, MUST RECANT OR "DISAVOW" CERTAIN BELIEFS, AND MUST FURTHER "ACKNOWLEDGE" OR FOSTER OPINIONS CONTRARY TO HIS CONSCIENCE.

Respondent FVCC correctly argued to both Montana courts, that under the doctrine of Connick, supra, in order to be protected by the Constitution, an employee's speech with possible exceptions, must relate to public not private concerns.

Talley argued that the public, both in the form of students protesting to the FVCC Board of Trustees at its monthly public meeting, as well as individuals writing letters to the editor of the local newspaper on his behalf was evidence of public concern.

The Court apparently did not find this evidence sufficient.

Talley next argued that even should the Court (as it did) find the issues to be of private concern, the instant the college made public employment contingent on the recanting of beliefs and on having to foster opinions contrary to one's

conscience, the issue rose to the level of public concern. The Court apparently rejected that argument as well.

Talley then showed that Connick, supra, allows for "unusual circumstances," which would allow private matters to receive constitutional protection, and argued that the requirement that he "disavow" and "acknowledge" was just such a circumstance. The Montana Supreme Court however, simply observed that, "'most unusual circumstances' were not defined in Connick," and concluded that ". . . Talley has not demonstrated 'most unusual circumstances' justifying an exception from the general rule set forth in Connick. . ."

Talley also argued that after his winter quarter contract ended, he was no longer an employee, but an ordinary citizen to which admittedly the provisions of Connick would not apply. Yet FVCC continued to make "disavowal" and "acknowledgment" a prerequisite. The Montana Supreme Court acknowledged this fact, but found it acceptable.

However, Talley's chief argument was turned aside by the Court in but one sentence. And of course that argument is that it is unconstitutional for the government to require the "disavowal" of beliefs and the compelling of speech

contrary to what one believes as a "test oath" or condition of employment.

In support of his argument, Talley referenced or quoted from Brandenburg v. Ohio, 395 U.S. 444 (19679), Reynolds v. United States, 98 U.S. 145 (1878), Sherbert v. Verner, 374 U.S. 398 (1963), Keyishian v. Board of Regents, 385 U.S. 589 (1967), Torcaso v. Watkins, 367 U.S. 488 (1961), West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), and Connell v. Higgenbotham, 403 U.S. 207 (1971); all of which stand for the proposition that the government may not require the disavowal of beliefs or the compelling of speech in order to receive a government benefit; in this case - employment at FVCC.

At every turn, the Montana Supreme Court declared that Talley's arguments did not address the requirements of Connick. However, it is instructive to note that in Connick, this Court referenced or quoted from three cases relied on by Talley, and did so for the same reasons that Talley did: to show that the government may not coerce belief. Torcaso, supra, Sherbert, supra, Keyishian, supra; Connick, supra, at 75 L.Ed.2d. 718.

Additionally, the Connick Court wrote:

"We have recently noted that official

pressure upon employees to work for political candidates not of the worker's choice constitutes a coercion of belief in violation of fundamental constitutional rights." Connick, Id. at 721.

Also, in an earlier case involving an individual's refusal to display that part of a state automobile license plate containing the state motto (with which the Plaintiff disagreed) this Court said:

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . .The right to speak and the right to refrain from speaking are complimentary components to the broader concept of 'individual freedom of mind' . . . Here, as in Barnette, we are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which is the

> purpose of the First Amendment of our Constitution to reserve from all official control.'" (emphasis added) Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752, 762 (1977).
>
> "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." Id., at 763.

Plainly, Talley found, and still finds morally objectionable the speech which FVCC tried to coerce. And he finds it to be doubly objectionable morally that it should make such a demand. And it is even more objectionable that FVCC has been able to do it for over six years.

Talley also pointed out to the court that his religious views equate work done in the spirit of service with worship, and that consequently his views about employment matters take on a religious significance; and that his political views do champion notions of employment security. But he also pointed out that such arguments should not be necessary; for in America, the

right to believe as one chooses is "inalienable" regardless of the subject matter.

In Brandenburg vs. Ohio, 395 U.S. 444, (1969), this Court held that freedom of speech meant that one is free to advocate ones belief, so long as it does not incite lawless action; which is hardly the case here. Talley suggested to the Montana Courts that the most appropriate legal test in Talley vs. FVCC may well be the "belief-action" test formulated over a century ago, and used ever since, although primarily in "free exercise of religion" cases. It simply states that belief is absolute, but that actions based on those beliefs may not be. Reynolds vs. United States, 98 U.S. 145, (1878).

In the present case, Talley held a certain belief, and the College supposedly held an opposing belief. (However, there is evidence of record that FVCC officials actually believed that a long series of unbroken contracts could lead to reemployment rights). Talley then advocated his belief. The College likewise advocated its belief through counsel Smith's letters of March 1 and 6, 1989.

But at that point, the equal comparison then stops. The College then took action, by requiring that Talley "disavow" his

belief and "acknowledge" something that he did not believe in order to be rehired. And when Talley would not comply, FVCC took further action by refusing to hire him. Talley was in no position to do anything other than to have his belief and advocate it, or say what it was. He was the employee, or potential employee. There was no action that he could take.

Legal precedent in this area is scarce, and not recent, for not many governmental agencies at the close of the 20th century are asking people to disavow beliefs and compelling them to utter contrary thoughts as a condition of employment.

This Court has said:

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. Sherbert vs. Verner, 374 O.S. 398, 10 Ed, 2d, 83 S. Ct (1790)(1963). (Emphasis added).

See also Keyishian vs. Board of Regents, 385 U.S. 589, (1967). What Talley was being subjected to was a form of test oath: In order to work at FVCC he would have to say that he did not have

certain employment rights, and in essence, declare that the College Administration had the unfettered right to do what it wanted irrespective of due process, equal protection, or Board of Trustees policies.

Regarding a test oath that involved religion, this Court said:

> "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him". Torcaso vs. Watkins, 367 U.S. 488, 6 L.Ed2d, 81 S. Ct. 247 (1961). Emphasis added.

The situation here is no different than that presented to this Court in the often cited case of West Virginia State Board of Education vs. Barnette (1943), 319 U.S. 624. In that case, certain students were excluded from school for refusing to salute the flag and recite the pledge of allegiance. Their readmittance to school was conditional on them taking part in this ritual. The Court struck down such a requirement observing that:

> "To sustain the compulsory flag salute, we are required to say that a bill of rights which guards the individual's right to speak his own

> mind, left it open to public authorities to compel him to utter what is not in his mind." (Barnette, supra, at 634).

In the present instance, Talley, in order to be employed by FVCC, for the Summer Quarter of 1989, and to be employed in the future under the same conditions as in the past six and one-half years, would have to "disavow" his beliefs, and to "acknowledge" something that he did not believe.

More recently, in Connell vs. Higgenbotham (1971), 403 U.S. 207, 29 L.Ed.2d 418, in which this Court decided that a non-tenured teacher had been unconstitutionally denied due process, Justice Marshall, in a concurring opinion, observed that:

> ". . . State action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he 'believes in the overthrow (of our government)' or any other sort of belief." (Connell, supra, at 421).

By way of summary, Talley states the one and only argument that need be made; one that has been championed over and over by this Court: This litigation is taking place in the United States of America - -

between an individual citizen, and in the main, a governmental entity. In this country, belief is absolute. One can believe in God, or in several deities, that God is feminine, or that there is no god. One can believe in the correctness of one political party (even Communism) and in the wrongfulness of the others. One can believe in, espouse, and advocate the correctness of Judaism over the majority religion, Christianity; or that the world is flat, or the moon made of cheese, or even that the President of the United States is an idiot; and yes, one can even believe that he has certain employment rights, and even say so, publicly or in private, it makes no difference. And the government cannot make his employment conditional upon his disavowing those beliefs and/or by compelling him to speak something that he does not believe.

For as this Court said over a half-century ago:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an

exception, they do not now occur to us." Barnette, supra, at 642.

Nor is the Petitioner aware of any exceptions that have occurred to this Court in the ensuing fifty-two years.

FVCC flatly denied that in America, beliefs are absolute. They criticized Talley's precedent cases for not being more recent notwithstanding the fact that these cases are among the most frequently cited by present courts, including this Court itself in Connick.

And as recently as 1990, this Court gave reaffirmation to this principle by observing that it is unacceptable for the government to:

> "press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52, 67 (1990).

None of the cases relied on by the Montana Courts dealt with an employee or a citizen seeking to be an employee of a governmental entity being required to disavow beliefs and to acknowledge contrary thoughts; whereas those cited by Talley dealt exactly with this issue. And in

those cases, the Plaintiff has always prevailed.

In addition, Talley pointed out to the Montana Supreme Court that FVCC engaged in prior censorship when it threatened to alter his working conditions unless he "disavowed" and "acknowledged." This Court has uniformly rejected such activity.

> "The threat of dismissal from public employment is . . . a potent means of inhibiting speech." Rankin v. McPherson, 483 US 378, 107 S.Ct. 2891, 97 L.Ed. 315, 324. (1987).

The Montana Supreme Court dismissed Talley's chief argument, as well as over fifty years of this Court's precedent by observing.

> "Talley also makes an argument concerning interference with his freedom of thought. However, it was Talley's statements, not his thoughts, which FVCC asked him to disavow."

In his Petition for Rehearing (which was denied) Talley pointed out to the Court the error in its reasoning. The only way that FVCC could have learned of Talley's beliefs or thoughts, was by his communicating them in verbal and written statements. His statements contained his beliefs, and

accordingly are synonymous. However, the majority of the Court would not reconsider its ruling.

CONCLUSION

The net legal result of the Montana Supreme Court's upholding of the award of summary judgment in favor of FVCC is that in Montana it is constitutional for a public employer to refuse to hire someone because he will not "disavow" something that he believes, and will not confess or affirm something to be true that he does not believe. The court has ruled that it is perfectly legal for the state to demand recantation of beliefs or opinions and the compelling of speech as a precondition of employment!

Talley has contended that the issues early in the development of this case involved matters of public concern; but even if they do not, the issue of a public employer demanding "disavowal" of beliefs then rose to the level of public concern.

He likewise argued that some private speech is protected if it involves "unusual circumstance"; and has argued that such "disavowal" and "acknowledgment" requirements is just what this Court had in mind when it created that exception.

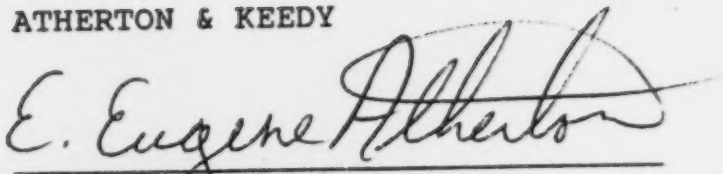
Additionally he pointed out that it is contrary to the holdings of this Court in Connick, supra, to allow Connick's provisions to be applied against one who is not an employee.

Finally, Talley argued that even if the issues involved were of private concern and that no unusual circumstances were involved, that he must still prevail, because by the very nature of things, and in the law of the United States, no supposed governmental right can overbalance the individual's right to believe as he chooses, and to not have to recant those beliefs and foster contrary opinions in order to receive public employment.

Petitioner respectfully urges this Court to act immediately to reverse this erroneous attitude taken by the Montana Supreme Court by granting certiorari to conduct its own review of the record below.

Respectfully submitted this 25th day of January, 1996.

ATHERTON & KEEDY



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APPENDICES

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APPENDIX

A. Opinion of the Supreme Court of the State of Montana in Talley v. Flathead Valley Community College, et al., 95-240, decided September 29, 1995;

B. Memorandum of the Supreme Court of Montana, dated October 26, 1995, denying Talley's petition for rehearing.

C. Order and Rational from the District Court of the Eleventh Judicial District, County of Flathead, State of Montana, dated February 28, 1995.

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1995

No. 95-240

FRANK TALLEY,

Plaintiff and Appellant,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 7, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants and Respondents.

Appeal From: District Court of the Eleventh Judicial District,

In and for the County of Flathead, The Honorable Katherine R. Curtis, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
E. Eugene Atherton,
Kalispell, Montana

For Respondents:
Todd A. Hammer,
Kalispell, Montana

Submitted on Briefs: August 31, 1995

Decided: September 29, 1995

Filed: /s/ Edward Smith
EDWARD SMITH
Clerk

Mr. Justice J.A. Turnage delivered the Opinion of the Court.

Frank Talley appeals from a summary judgment entered by the Eleventh Judicial District Court, Flathead County, on his free speech claim. We affirm.

The issue is whether the District Court erred in granting Defendants' motion for summary judgment on the free speech claim and denying Talley's motion for summary judgment on the same claim.

From 1982 until 1989, Talley was employed under a series of term contracts as a part-time philosophy and religious studies instructor at Flathead Valley Community College (FVCC). During the winter of 1989, FVCC canceled Talley's religious studies class, but later reinstated it. Talley's classes for spring quarter 1989 were canceled. From that time forward, FVCC did not rehire Talley.

Upon learning that his classes for spring 1989 had been canceled, Talley asserted his belief that he had a right to continued employment. He communicated this belief to FVCC's president personally, to FVCC through letters from his attorney, and to the FVCC Board of Trustees personally. Talley's attorney wrote: "[I]f [Talley] is

employed, it will tend to look as though the college has followed through with its intent to continuously employ my client."

FVCC responded by letter through its attorney that any claim by Talley of a continuing right of employment was not supported under the language of his employment contracts. FVCC's attorney asked Talley to disavow his expectation of continued employment. "In absence of such a disavowal and acknowledgement, I must advise [FVCC] . . . not to employ Mr. Talley for the summer quarter and to employ him very sparingly thereafter." FVCC's counsel cautioned that Talley's expectation might otherwise ripen into a reasonable expectation of continued employment.

In October 1989, Talley filed a complaint listing multiple claims for relief relating to FVCC's failure to rehire him. The District Court granted summary judgment to Defendants on most of Talley's claims. The court certified its judgment for interlocutory appeal pursuant to Rule 54(b), M.R.Civ.P. This Court affirmed. Talley vs. Flathead Valley Community College (1993), 259 Mont. 479, 857 P.2d 701. Talley's case then resumed in District Court on his remaining claims, violation of his right to free speech and slander.

Both Talley and the Defendants moved for summary judgment on the free speech claim. Talley maintained that FVCC conditioned his continued employment at FVCC upon his abandonment of his position that he had a right to continued employment, and, in so doing, violated his right to free speech. The District Court ruled as a matter of law that Talley's speech was not constitutionally protected in this instance because it did not address a public interest or concern but rather involved private, employment-related issues. The court therefore granted Defendants' motion for summary judgment.

The case then went to trial on the remaining claim of slander by Defendant Lowell Jaeger. The jury returned a verdict for Jaeger. Talley now appeals the summary judgment on his free speech claim.

Did the District Court err in granting Defendants' motion for summary judgment on the free speech claim and denying Talley's motion for summary judgment on the same claim?

This Court's standard of review of a summary judgment is the same as the standard initially used by the district court and set forth at Rule 56(c), M.R.Civ.P. This Court must determine whether there is a genuine issue of

material fact and whether the moving party is entitled to judgment as a matter of law, based upon the facts set forth in the pleadings and any depositions, answers to interrogatories and requests for admissions, and affidavits filed. Minnie vs. City of Roundup (1993), 257 Mont. 429, 431, 849 P.2d 212, 214.

In this case, Talley's cross-motion for summary judgment demonstrates that there are no issues of material fact. The question is whether, based upon the record, FVCC was entitled to judgment as a matter of law.

The First Amendment protects speech of public employees upon matters of public concern. This furthers the purpose of the First Amendment "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Connick v. Myers (1983), 461 U.S. 138, 145, 75 L.Ed.2d 708, 718, 103 S.Ct. 1684, 1689 (citation omitted).

However, except in "the most unusual circumstances," the First Amendment does not provide immunity for speech concerning matters only of personal interest to the public employee. Connick, 461 U.S. at 147. This assures government employees the same rights as those who do not work for the government. Whether an employee's speech

addresses a matter of public concern must be determined by the context, form, and content of a given statement, as revealed by the whole record. Connick, 461 U.S. at 147-48. The inquiry into the protected status of speech is one of law, not fact. Connick, 461 U.S. at 148, n. 7.

Although "most unusual circumstances" were not defined in Connick, Talley argues that such circumstances are present here. He asserts that the elimination of his classes at FVCC was a matter of public concern; that he spoke out publicly as well as privately about it; and that after his last contract with FVCC expired, he was an ordinary public citizen and his comments about FVCC were no longer subject to the threshold inquiry from Connick.

Talley submitted to the court copies of letters between FVCC's attorney and his attorney, and Defendant Howard Fryett's responses to interrogatories and requests for admissions. He submitted his own affidavit, in which he recounted his "quest for due process." He also submitted a copy of an April 1989 article from the local newspaper, describing an FVCC board meeting. The headlined result of the meeting was an increase in tuition fees. The article included a paragraph stating that Talley had appeared before the board to protest the elimination of his classes

and to threaten a lawsuit.

Talley cites as comparable to this case Trotman vs. Board of Trustees of Lincoln University (3rd Cir. 1980), 635 F.2d 216, in which James Trotman successfully sued Lincoln University for failing to renew his teaching contract. Trotman was decided prior to Connick, and the Connick distinction between matters of public concern and matters of private concern was not addressed therein. The Trotman opinion does, however, allude to the widespread nature of the dispute between teachers and the administration of Lincoln University. Trotman, 635 F.2d at 219.

The Fifth Circuit Court of Appeals has ruled that grievances or complaints about the subject of class scheduling are not a matter of public concern, but are instead personal or private employment-related grievances not within constitutionally-protected "free speech" claims under the First Amendment. See Dorsett vs. Bd. of Tr. for St. Colleges & Univ. (5th Cir. 1991), 940 F.2d 121. In Dorsett, a tenured associate math professor brought a 42 U.S.C. § 1983 civil rights claim against university officials for alleged harassment and violation of First Amendment rights. The professor alleged that he had been denied summer employment by the administration in retaliation for publicly

supporting another professor who refused to lower academic standards. He alleged that his exercise of free speech on matters of public education caused the retaliation.

The court disagreed.

> Communication . . . rises to the level of public concern if a person speaks primarily as a citizen rather than as an employee. We must assess, therefore, Dorsett's motivation in complaining to the administration. After reviewing the summary judgment evidence, we conclude that Dorsett's complaints at the time of the alleged harassment reflected predominantly his concerns about the assignment of summer and overload classes to himself and to his friends int he department. These concerns are matters of private, not public, interest.

Dorsett, 940 F.2d at 124 (citations omitted).

In the present case, the record does not establish that FVCC's failure to rehire Talley was a matter of public debate or interest in the community at large. The record, however, does establish that

Talley's primary motivation for his statements was his desire for more teaching contracts for himself. We conclude that Trotman is not persuasive authority for Talley's position in this case. We further conclude that Talley has not demonstrated "most unusual circumstances" justifying an exception from the general rule set forth in Connick and applied in Dorsett.

Talley also makes an argument concerning interference with his freedom of thought. However, it was Talley's statements, not his thoughts, which FVCC asked him to disavow.

Finally, Talley points out that the District Court did not grant summary judgment on the free speech claim prior to the first appeal, and that in its opinion on that appeal, this Court wrote:

> We conclude that the only constitutional claim which has merit under the pleadings is the claim of denial of free speech according to the First Amendment to the United States Constitution and the attendant § 1983 claim.

Talley, 857 P.2d at 708. He argues that this represented a ruling that his free speech claim must be allowed to proceed to trial.

The District Court's failure to grant summary judgment on the free speech claim was not an issue before this Court in the first appeal. In that opinion, we further stated: "No summary judgment being issued, [the free speech] claim is still alive." Talley, 857 P.2d at 708. The language cited by Talley was not a ruling on the merits of the free speech claim; it was merely dicta.

In the current appeal, in contrast, the propriety of summary judgment on the free speech claim is the issue before this Court. We have now reviewed the summary judgment, and we hold that entry of summary judgment for Defendants on the free speech claim was correct.

Affirmed

/s/ J.A. Turnage
Chief Justice

We concur:

/s/ James C. Nelson

/s/ Karla M. Gray

/s/ W. William Leaphart
Justices

Justice William E. Hunt, Sr., respectfully dissents:

I do not agree with the conclusion of the majority that the language of our opinion in Talley, 857 P.2d at 708, is dicta, when this court wrote:

> We conclude that the only constitutional claim which has merit under the pleadings is the claim of denial of free speech according to the First Amendment to the United States Constitution and the attendant 1983 claim.

Talley, 857 P.2d at 708. Our conclusion was a ruling on the merits of the free speech claim. I would reverse the summary judgment by the District Court and allow the matter to go to trial.

/s/ William E. Hunt, Sr.
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1995

No. 95-240

FRANK TALLEY,

Plaintiff and Appellant,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 7, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants and Respondents.

The petition for rehearing is denied.

DATED this 26th day of October, 1995.

/s/ J.A. Turnage
Chief Justice

We concur:

/s/ James C. Nelson

/s/ Karla M. Gray

/s/ W. William Leaphart
Justices

Justice William E. Hunt, Sr., would grant the petition for rehearing.

APPENDIX C

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-89-526(B)

FRANK TALLEY,

Plaintiff,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 7, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants.

ORDER AND RATIONALE

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment, Defendants' Alternate/Additional Motion for Summary Judgment, Plaintiff's Briefs in Opposition thereto; Plaintiff's Motion for Partial Summary Judgment and Defendants' Briefs in Opposition.

Defendants move for summary judgment on Plaintiff's "free speech" civil rights claim. They argue that, as a matter of law, the speech of Plaintiff at issue does not fall within the constitutional protection of 42 U.S.C. § 1983, in that it did not address a public interest concern but, rather, involved private, employment-related issues.

Plaintiff argues that the issues addressed in his speech were matters of public concern. He also argues that the actions of the Defendants were based upon his refusal to disavow a belief, and that constitutional protection for beliefs is absolute.

This Court, on September 21, 1992, entered its Order on the parties' initial cross-motions for summary judgment. That

Order was affirmed on appeal.

On August 29, 1994, the Court entered its Order on Plaintiff's Motion for Clarification, requesting clarification as to the specific issues remaining to be determined, stating as follows:

1. Defendants' Motion for summary judgment is granted as to Counts One; Two; Three; Four with the exception of Plaintiff's free speech claim; Five; Six, except as it applies to Plaintiff's free speech claim; Seven; Eight and Ten.

2. Defendants' motion for summary judgment is denied as to Count For regarding Plaintiff's free speech claim and Count Six regarding Plaintiff's free speech claim, and Count Nine.

The summary judgment order was appealed to the Montana Supreme Court, and it is clear from the opinion of the Supreme Court that only the slander claim and the free speech claim based upon the letter sent to the Plaintiff by FVCC, which asked him to disavow any expectation of continued employment, survived summary

judgment.

Order, 8/29/94, at 1-2 (emphasis added unless otherwise indicated). It is in this procedural context that the Court now rules on the pending motions.

Based upon the Defendants' Motion for Summary Judgment, Brief and Reply Brief in support thereof; Plaintiff's Brief in Opposition, and Rebuttal; Plaintiff's Motion for Partial Summary Judgment and Brief in support thereof; and Defendant's Brief in Opposition; and the Court being fully advised in the premises; Now therefore

IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment as to the Plaintiff's free speech claim under 42 U.S.C. § 1983 be and the same hereby is GRANTED.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Partial Summary Judgment be and the same hereby is DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion in Limine be and the same hereby is GRANTED.

RATIONALE

In order to recover for a free speech violation under the Civil Rights Law, 42 U.S.C. Sec. 1983, Plaintiff's speech must be protected speech. This issue is a question of law. Stewart v. Parish of Jefferson, 951 F.2d 681 (5th Cir. 1992). The analysis of the context, content and form of the speech in question is also a question of law. Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983). Thus, this inquiry may properly be heard as a Motion for Summary Judgment. The Court's earlier Order on Summary Judgment, upheld by the Montana Supreme Court, held that the only remaining causes of action were the slander claim and the free speech action based upon the disavowal letters. Only the speech surrounding the disavowal letters is at issue in the pending motions.

In order to form the basis of a civil rights claim, Plaintiff's speech must address a matter of public concern. In Connick v. Myers, supra, the United States Supreme Court stated:

> We hold that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal

> interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency in relation to the employee's behavior... Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Connick, 75 L.Ed.2d at 720.

The content of Talley's speech that is at issue here deals with issues of Talley's claim to a continuing right of employment and the college not offering his classes because he refused to disavow that right. These are private employment grievances. Courts have recognized that the cutting or assignment of classes involve matters of private concern and do not provide the basis for a civil rights claim. See Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121 (5th Cir. 1991). In Dorsett, a tenured math professor brought a 42 U.S.C. Section 1983 civil right claim against university

officials alleging violation of his First Amendment rights. The professor contended he was denied summer class assignments in retaliation for speaking out in support of another professor who refused to lower academic standards. The Fifth Circuit Court of Appeals held that the professor's speech did not address a matter of public concern. "Communication thus rises to the level of public concern if a person speaks primarily as a citizen rather than as a employee..... We must assess, therefore, Doresett's primary motivation in complaining to the administration. After reviewing the summary judgment evidence, we conclude that Dorsett's complaints at the time of the alleged harassment reflected predominantly his concerns about the assignment of summer and overload classes to himself and to his friends in the department. These concerns are matters of private, not public, interest." Dorsett, 940 F.2d at 124.

Plaintiff, in his Brief in Opposition, contends that the issues about which he spoke "were of intense public concern." He continues: "Several instructors' classes were being cut... [s]tudents were protesting; posters placed [sic] around campus...and the posters torn down; ...letters were being written...." However, none of these activities are directly related to the Plaintiff's claim.

The speech at issue, and the only speech at issue, as focused by this Court's previous Order, is Plaintiff's assertion of a right to continued employment, and his refusal to disavow that right. There is no indication whatsoever that this speech was in any respect a matter of public concern.

Plaintiff further asserts that because FVCC is "a public employer, a governmental entity no less, " the actions it takes are of necessity of public concern. This proposition was squarely rejected in Gomez v. Texas Department of Mental Health, 794 F.2d 951 F.2d 681, 683 (5th Cir. 1992).

The Plaintiff next analogies this case to those based on a "belief-action" test used in freedom of religion cases. He cites Sherbert v. Verner, 374 U.S. 398, 10 L.Ed. 2d 965, 83 S.Ct. 1790 (1963) in support of this proposition. It is very important to note, however, that that case referred to the placing of conditions "upon a benefit or privilege." 10L.Ed.2d at 971. No one doubts that the instant case would be in a different posture if this Court had not earlier ruled that the Plaintiff had no reasonable expectation or protected privilege of continued employment. But, it did. Therefore, Plaintiff's argument and cited cases in this regard do not address the directive of the United States Supreme Court in Connick v. Myers, supra, that

speech, in order to form the basis of a claim under 42 U.S.C. § 1983, must be on matters of public concern. In fact, one of the cases cited by Plaintiff, Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 817, 88 S.Ct. 1731 (1968), specifically references "comment on matters of public interest".

It is clear that the thrust of Talley's assertion of a right to continued employment was the expression of a personal, employee grievance, spoken as an employee, rather than communication of a public concern spoken primarily as a citizen. Such speech is not properly redressed under 42 U.S.C. § 1983. See Dorsett v. Board of Trustees for State Colleges and Universities, supra; see also Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1992). Thus, Defendant's Motion for Summary Judgment is well-taken.

On the basis of the foregoing, Defendants' Alternative Motion for Summary Judgment need not be addressed; and Plaintiff's Motion for Summary Judgment is denied.

Defendants also make several Motions in Limine. The Plaintiff agrees to Defendants' Motions No. 1, 2, 3, 4 and 6, but objects to No. 5. Defendants' Motion

in Limine No. 5 requests that the Court exclude any mention of or evidence concerning any theories other than slander and the civil rights claim. Plaintiff objects and argues that Talley should be able to make due process arguments in relation to the free speech claim. The granting of Defendants' Motion for Summary Judgment is also dispositive of this motion. The only remaining count is one for slander and only evidence regarding the slander claim is admissible.

DATED this 28th day of February, 1995.

/s/ Katherine R. Curtis
District Judge